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Utah Supreme Court

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UNIVERSITY OF UTAH

OCT 29 1963

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IN THE SUPREME COURT OF THE STATE OF UTAH

RAY TANNER,

Plaintiff and Appellant,

vs.

UTAH POULTRY & FARMERS
COOPERATIVE, a corporation
GEORGE RUDD and CHARLES
P. RUDD,

Defendants and Respondents.

FILED

OCT 6 - 1963

Clerk, Supreme Court, Utah

: CASE
: NO. 9721

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Third District Court
for Salt Lake County, Honorable Merrill C. Faux,
Judge.

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RAY TANNER, :

Plaintiff and Appel-
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vs. :

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COOPERATIVE, a corporation, :

GEORGE RUDD AND CHARLES :

P. RUDD, :

Defendants and res-
pondents. :

APPELLANT'S REPLY BRIEF

STATEMENT OF THE CASE

and

STATEMENT OF FACTS

Appellants original statement of case and statement of facts has been generally agreed upon by respondents.

ARGUMENT

POINT I. PROFFER OF EVIDENCE RELATING TO MARGINS AND RESERVE WAS TIMELY AND PROPER.

At the time of plaintiff's proffer of evidence regarding the sixth cause of action which relates to margins, assets and reserves, the court was not unaware that plaintiff had pleaded and with some particularity the nature of his demands concerning margins. The court read paragraphs 2, 3, 4, 5, 6, and 7 of the sixth cause of action which specifically set out these demands. P. 751 L.12 to P. 752 L.12. The pre-trial order on Page 257 mentions net margins and reserves and on Page 258 under Caption "Proceedings of December 6, 1961", the question of reserves and assets are discussed.

Plaintiff's amendment to amended complaint on Page 253 sets out allegation after allegation regarding margins and unlawful withholding and concludes with a prayer for judgment. P.254.

(1) That Utah Poultry and Farmers Cooperative produce their records and if necessary to make amendments thereto to accurately reflect the interest of the plaintiff as a patron and a member in the reserves and the assets of the defendant association. Defendant's counsel prepared himself an amendment to the pre-trial order, P. 276 and 277, in which he concludes in item 2 "That the issue in the sixth cause of action to the building of unreasonable reserves and accumulations during and subsequent to 1948 is reserved for the trial court herein."

The sixth cause of action was the last cause and the proffer of evidence in this regard could come in no other logical position than at the end. Counsel for plaintiff on P. 1188 L. 22 made reference to treatment of margins and reserves in the future.

Why then should the defendant complain that the evidence was not pleaded and that it came too late in the trial? The answer appears simple; the evidence submitted was so effective and damaging that the defendants could not counter it. The court appeared to agree with the plaintiff's position that the accounting procedure of defendants did not conform to its article of incorporation and by-laws. P. 1068 L. 12, to P. 1103 L. 30 and P. 1119 to P. 1131 with emphasis on pages 1098 and 1099. It, however, would not come to grips with the problem perhaps because of the

magnitude of the problem. Had the court determined this issue adversely to the plaintiff upon an issue of law on the merits as it originally announced it would (L. 12 to L29, P. 1100) the plaintiff, although disappointed, would have little basis for argument. However, when the court holds that the evidence comes too late in the presentation of plaintiff's case (L. 28 P. 1388, to L. 10 to P. 1389) it commits reversible error.

The error committed by defendants in computing reserves, margins and assets can be succinctly stated that the by-laws and articles of incorporation of the defendant provide that the business done by the association should be departmentalized into two departments and that the patrons should be given credit for a share in the reserves, margins and assets

created thereby. Instead, defendant has departmentalized into numerous departments and have limited a patron's participation to one department. The gravity of this departure is readily apparent. P. 1073 L. 15 to P. 1076 L. 9.

II. SHORTAGE AND DISCREPANCIES WHICH DEFENDANT REFUSED TO DISCLOSE UNTIL ORDERED BY THE COURT TO PRODUCE SUSTAINS A FINDING OF FRAUD SUFFICIENT TO TOLL STATUTE OF LIMITATIONS.

The court, in determining whether or not there was fraud shown by the plaintiff in his presentation relied wholly upon his impression of the plaintiff, apparently disregarding completely substantial evidence in the form of discrepancies in defendants own records, a written contract meant to govern the transaction between the parties and the law relating to the responsibility of a judiciary to account.

Commencing on P.1391, L.25 the court justifies its conclusion of no fraud by listing reasons:

1. Mr. Tanner's own auditor testified in his investigation that he was "aware only of complete cooperation" in supplying him with books records, documents.

The fact is that the exhibits and records upon which plaintiff bases it's case were never discovered until years after the auditor made his examination. And then they were only produced after the defendant's manager, George Rudd, was found in contempt of court and sentenced to a fine and suspended jail term. P.54 67,69 and 79. The discrepancies were found in defendants records on a deposition of George Rudd dated February 9, 1960. How much

weight can be placed upon a discharged auditor's expression of cooperation.

2. P.1391 L. 30. The demeanor of witnesses representing the defendant here on the witness stand have impressed the court as knowing their business and have been helpful to the court.

The court then singled out Vernon Ferre as being honest and open. Only two employees testified for the defendant, Vernon Ferre, who had little contact with plaintiff and George Rudd, a co-defendant.

3. P.1392 L. 9. The court has the impression of Mr. Tanner to the contrary. The court has had the impression that Mr. Tanner has been evasive; that he has not willingly disclosed.

4. P. 1392, L. 18. Contention of Mr.

Tanner that he has never made a direct sale to the defendant in apparent contradiction of Exhibit 52-P.

Mr. Tanner explained his answer on P. 696, L. 16 to L. 30. The contract provided title passed to all turkeys and that his birds were to be handled under this agreement.

5. P. 1392 L. 27. The fact the plaintiff charged the defendant's employee \$50.00 for a hat in payment of a bet he won.

6. Plaintiff's insistence that he didn't see truchers receipts and finally admitted he once had the receipts.

7. P. 1393, L. 4. He volunteered that he was influenced by the bank's attorneys and denied talking to them.

Isn't it possible the bank relayed the information from the attorneys?

8. The fact that plaintiff's counsel was desirous of admitting receipt of \$2,500.00 and that finally the copy of testimony of Miss Lee and then it was admitted that the \$2,500.00 was received by Mr. Tanner.

Mr. Tanner never admitted receiving the \$2,500.00 and on cross-examination Miss Lee admitted she didn't recall giving the particular draft to Mr. Tanner. P.1308 L.1 to L.10. The copy presented was not the cancelled original.

Exhibit 71-D

Now compare this with the evidence submitted by the plaintiff which the court did not mention nor apparently consider.

1. A written contract (Exhibit 2) signed by both parties specifying how business between the parties was to be handled, providing that all

produce was to be handled on an account sales basis.

2. Discrepancies in the number and price of birds for which defendant accounted and the number of birds actually held in Ray Tanner's name and the actual market price as follows:

(a) Exhibit 3 P, a settlement sheet introduces at L. 11, P 341, show defendant settled with plaintiff for 5,232 head of turkey while Exhibit 5 P showed that defendant eviscerated and put in storage 5,692 head. This amounted to a loss to plaintiff of \$296.83. P. 345 L. 1 to P. 350, L. 12.

In addition defendant settled with plaintiff on a New York dressed price while Exhibit 5P shows the birds were eviscerated bringing a higher price. Exhibit 3 P shows plaintiff

received a price of .475 for prime hens while Exhibit 6 P shows market price to be \$.66 to 67 cents (P. 356 L. 24) causing a loss to plaintiff in amount of \$6,839.28 on prime hens. P. 350, L. 24 to P. 351, L. 13 and P. 356, L. 19 to P. 359, L. 14.

Loss on marketing the lower grade of birds on the same theory amounted to 1377.64. P. 362 to P. 363, L. 1.

(b) Short age on the second flock in 1949 as evidenced by figures on Exhibit 7 P, a settlement sheet dated December 12, 1949, and those of the eviscerating invoices showing the actual number of those in storage were minimal but the price differential on price given to plaintiff and the market price of Exhibit 8P in a Urner Barry Report, amounted to a loss of \$4,056.00. P. 372, L. 18

to P. 337, L. 21. The defendants' attempt to explain the differences by saying the turkeys were purchased outright. P. 382 L. 10-13. This explanation appears very weak in light of the contract signed in August, 1949 (Exhibit 2) which provided defendant would account for sales. These transactions occurred in September and December of 1949 only a few months after the agreement was signed. Defendant did not produce a single record to justify their position. And if defendant speculates for its own gain there is no advantage to plaintiff in dealing with a cooperative.

(c) Losses on 1950 crop to plaintiff in shortages and discrepancies in prices amounted to \$22,458.40 as follows:

(1). P. 475, L. 1-16 indicates a

loss of \$1,454.00 because of shortages between exhibit P 20, eviscerating invoices showing actual number of prime hens in storage in plaintiff name after evisceration, (P.473, L.23 to 474 L.4) and the settlement sheet given to plaintiff by defendant, Exhibit 21 P P475, L.21.

(2). P.476 L.16-30 shows a loss of \$635.64 as a result of shortages on plaintiff's prime toms. This figure obtained by comparing Exhibit 21 P with 20 P.

(3). P.479, L.14 to P.480, L.15 indicates that plaintiff lost \$4,791.50 because of price differential on prime toms between the accounting of 21 P, a settlement sheet given to plaintiff and Exhibit 25 P, a Urner Barry price quotation dated December 21, 1950, the date of the accounting.

(4) P.480, L.16 to P.481, L.8

indicate a loss of \$4,943.52 on plaintiff's prime :
hens because of a price differential from the
Urner Barry Market Report, Exhibit 25P dated
December 21, 1950, and price paid plaintiff as
shown on Exhibit 21 P dated Dec. 21, 1950.

(5) P.496 L.25 to P.497 indicate
a loss to the plaintiff for prime toms marketed
on March 20, 1951 (1950 crop) in the amount
of \$8,582.10. This discrepancy is shown
between the settlement sheet 24P dated March
20, 1951, and the Urner Barry Price Quo-
tation Exhibit 27 P dated March 20, 1951.

(6) P.499 L.19 to L.28 shows a
loss of \$2,034.30 on B. Toms marketed on
March 20, 1951. This figure is arrived at by
the difference in Exhibit 24 P and plaintiff's

testimony regarding prices of B. Toms in relation to A. Toms on Exhibit 20 P, dated March 20, 1951.

Deductions for freight were not made in prices for 1950 crop because most of the birds were sold locally, many to Charles Rudd by his brother, George Rudd. P. 501.

The stipulation regarding the admission of the Urner Barry Reports was made at pre trial (P 282) after plaintiff had indicated he would bring an expert witness to testify. If defendants had any objections to the price quotations on the Urner Barry Reports, they should have introduced evidence to the contrary which they did not.

P. 726, L. 19 to P. 727, L. 10 lists the testimony of Charles Rudd, former manager of the defendant Utah Poultry, that Urner Barry Reports were used to determine market price

The first paragraph on Exhibit 6 P and all Warner Barry Reports indicates what type of prices they reflect.

"The quotation given in this publication represent to the best of the reporters knowledge prevailing values in the specified grades of each commodity as determined by exchange trading sales in stores from receivers and wholesale distributors, or by willingness and ability to sell and by willingness and ability to buy. Plaintiff alleges that this latter evidence of shortages and discrepancies combined with the defendants' refusal to account for actual prices and to allow plaintiff to examine the eviscerating invoices until ordered by the court in and of itself justify a finding of fraud sufficient to toll the Statute of Limitations in light of the judiciary relationship existing between the parties.

Plaintiff contends that the discrepancies and shortages shown in and of themselves together with the fiduciary relationship which existed between the parties makes at lease a prima facie case of fraud requiring the defendant to assume the burden of proving affirmatively by clear and convencing evidence that the alleged fraud did not exist, Plaintiff further contends that the justification by the court in finding there was not sufficient fraud to toll the Statute of Limitations did not meet this requirement.

24 Am. Jur. 258, P. 90 states:

"If in a transaction between parties who stand in a relationship of trust and confidence the party in whom the confidence is reposed obtains an apparent advantage over the other, he is presumed to have obtained that advantage fraudulently; and if he seeks to support the transaction, he must assume the burden of proof that he has taken no advantage of his influence or knowledge and that the arrangement is fair and conscientious. If he succeeds in producing proof

sufficient for such purpose, as, for example, by showing that the confidence reposed in him was not abused, but that the other party acted on independent advice, the party alleging fraud, having the ultimate burden of proof to establish such allegation, must resume the burden of producing evidence to show fraud. It is said that a fiduciary seeking to profit by a transaction with the one who confided in him has the burden of showing that he communicated to the other, not only the fact of his interest in the transaction, but all information he had which it was important for the other to know in order to enable him to judge of the value of his property. The presumption of fraud on the part of a fiduciary arises, but not because the court can see that there was fraud, but because there may have been fraud."

23 Am. Jur. 14, P. 765 states:

"Where a confidential or fiduciary relationship exists, it is the duty of the person in whom the confidence is reposed to exercise the utmost good faith in the transaction and to refrain from abusing such confidence by obtaining any advantage to himself at the expense of the confiding party. Should he obtain such advantage, he will not be permitted to retain the benefit; and the transaction will be set aside, even though it could not have been impeached had no such relation existed, whether the unconscious ~~able advantage was obtained by misrep re-~~

sentations, concealment or suppression of material facts, artifice, or undue influence."

III. THE RELEASE (EXHIBIT 66-D) APPLIED ONLY TO THE 1951 CROP OF TURKEYS IN SPITE OF DEFENDANTS COUNSEL INSISTENCE TO THE CONTRARY.

The release specifically sets out the consideration (being the balance owing to me under the marketing of my 1951 crop of turkeys). There was no other consideration paid by defendant. Exhibit 64-D defendants' own evidence, a letter sent by defendant's counsel to the plaintiff details this position. "The settlement sheet shows a marketing credit balance in you favor of \$64,004.03. There is \$54,653.97 owing to the Utah Poultry on their account with you. This leaves a balance in your favor of \$9,350.06, a check for which amount, made out to you and you and the Farmers and Merchants Bank is being forwarded

to the bank, inasmuch as it holds a Chattel Mortgage on these turkeys." The exact amount of the release was \$9,350.06.

The contention by defendants that the release covered more than the year 1951 is indicative of their bad faith and knowledge that they were indebted to the plaintiff for other sums in addition to money owed for 1951. And if the court will indulge me the satisfaction of saying, "This is an attempt to:" Reap where thou has not sown."

Plaintiff requests that the court reverse the lower court and enter judgment for plaintiff in the amount of \$37,338.15 and send back to the District Court for further testimony plaintiff's sixth cause of action relating to margins and reserves unlawfully withheld.

Respectfully submitted,

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